Reverting to the circumscribed jurisdictional limitations in the English admiralty, we nevertheless find this comment by Lushington, Judge of the High Court in Admiralty, in *Harriet*, 1 Rob. Adm. 183, 192:

"If a court in equity could relieve, and a court of law could not, I consider that it would be my duty to afford that relief under the circumstances of the present case. The jurisdiction which I exercise is an equitable as well as a legal jurisdiction, and I must relieve the parties in this suit if they are entitled to be relieved by law or in equity."

It clearly appears, therefor, that despite the narrow limited scope of the subject matter within the jurisdiction of English admiralty courts, whenever the subject matter, as the basis for the action, was within their jurisdiction, the admiralty courts applied both legal and equitable principles in adjudicating the matters before them. And so, as Mr. Justice Story stated in the *Virgin*, 8 Pet. Adm. 538, 539; 8 L. Ed. 1036, speaking of the considerations which control the jurisdiction of the Federal courts sitting in admiralty:

"Such courts, in the exercise of their jurisdiction, are not governed by the strict rules of the common law, but act upon enlarged principles of equity."

When obligations exist under the terms of a contract, or as a legal duty annexed to a contract by operation of law, if the contract be maritime it is clearly within the cognizance of admiralty and the jurisdiction is complete and cannot be confined to one of the remedies on the contract. *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344, 391, supra.

In the case at Bar, though the petitioners were entitled to sue for additional damages such as their expenses in coming to New York, putting up in hotels, etc. anticipating departure of the vessel (Cf. *The Normania*, S. D. N. Y., 62 Fed. 469), because the petitioners are scattered throughout the country such additional damages were not included be-

cause the expense of proving each person's supplemental damage would far exceed those damages. Consequently, each petitioner's damage was limited to that measured by the amount he had prepaid as passage money. By whatever label the artificiality of the common-law may attach to the claims of the petitioners, the substance of their demands is to be indemnified for the breaches of the contracts of carriage to the extent measured by the amounts they had paid thereunder as consideration, regardless of whether their claims be termed as "money had and received" pursuant to maritime contracts, or as claims for damages resulting from the breach by reason of failure to transport, or as claims for damages to the extent of the sums so paid arising from the breach of duty to refund which is annexed to the contracts of carriage by law.

Under the contracts of carriage, the petitioners had the duty to prepay their passage monies, which they did, while the respondent had the duty of transporting them by sea or provide substitute transportation, which he did not.

"Freight", the consideration under contracts for transportation by sea, is a subject matter that has been within our admiralty jurisdiction for many years and is to be determined on like legal principles in the case of transportation of passengers by sea. *The Main*, 152 U. S. 129, quoting from *Giles* v. *Cynthia*, 1 Pet. Adm. 203, 206. See also: *Brown* v. *Harris*, 2 Gray 359, wherein is stated that:

> "Passage money and freight are governed by the same rules. Indeed, 'freight', in its more extensive sense, is applied to all compensation for the use of ships, including the transportation of passengers."

Regardless of the common-law nomenclature of "money had and received", this money, received as consideration under the contracts of transportation, constituted "freight" since it was received pursuant to maritime contracts of carriage and therefore, logically speaking, acquired the cloak of a "maritime" consideration.

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IN THE

Supreme Court of the United States

October Term, 1955

No. 351

R. V. ARCHAWSKI, ET AL.,
Petitioners,

v.

BASIL HANIOTI, ETC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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It is well settled that the shipowner can invoke the jurisdiction of the admiralty Court and sue for "freight" due to him for the performance on his part of a maritime contract of carriage and the non-performance of the shipper thereunder, who fails to pay the consideration, or "freight".

Under the doctrine of "equality under the law", or "equal application of the law", if the shipowner can recover freights due to him, in admiralty as a remedy, then the payors should have the right to recover their prepaid, unearned, freights, in admiralty, when the shipowner breaches his contracts. Such is only just and fair and merely reciprocity of remedies to the parties.

A century ago, in *Cobb v. Howard*, 5 Fed. Cas. 2925, aff'd C. C. N. Y., 5 Fed. Cas. No. 2924, it was held that the duties appertaining to passenger contracts for marine transportation were as maritime as the contracts themselves and that causes of action by passengers for the recovery of passage monies "had and received" by the defaulting carrier were just as maritime as the contracts and clearly within admiralty's jurisdiction. See, also: *The Pacific*, Fed. Cas. No. 10643, cited therein. And, in *The Guardian*, 89 Fed. 998 (D. C. Wash.), it was held that admiralty had jurisdiction *in personam* in actions against the carrier for the recovery of the amounts paid for such passage when the contract is breached. In the *Eugene*, 83 Fed. 222, also id. 9th Cir., 87 Fed. 1001, where the prospective passenger prepaid his fare and did not receive the transportation, because the contract was wholely executory it was held that he could not enforce his claim *in rem* against the vessel but was limited to an action *in personam*.

The Court of Appeals for the Fourth Circuit, in the very subject matter of the instant case, sub nom *Acker et al. v. The City of Athens*, 177 F. 2d 961, affirmed the District Court of Baltimore for the reasons asserted by that Court in its lengthy, scholarly opinion, sub nom *Todd Shipyards v. The City of Athens*, 83 Fed. Supp. 67, and in which, in

denying enforceability of the libelants' claims *in rem*, that Court stated (p. 64):

> "These contracts of affreightment for passenger transportation, *although maritime contracts of which the admiralty court would have jurisdiction*, do not constitute maritime liens, * * *." (Emphasis supplied.)

An analogous situation to that in the case at Bar, except that shippers of cargo, rather than prospective passengers, were involved, is the *Henry W. Breyer*, 17 F. 2nd 423 (D. C. Md.). There, the shipowner was likewise insolvent at the time he was soliciting the cargoes and receiving the prepaid freights and the vessel did not break ground because of his insolvency. In accord with this Court's statement in the *New Jersey Steam Nav. Co.* case, supra, that the jurisdiction in admiralty extends to all of the remedies on the contract without limitation, the District Court held that the shippers' actions for recovery of the unearned, prepaid freights were both, in contract and tort, and within admiralty's jurisdiction. Extensive, sound, and authoritative reasoning is set forth in the *Breyer* case.

The United States Court of Claims has consistently dismissed claims for freight, and money had and received pursuant to maritime contracts, upon the ground that the jurisdiction lay in admiralty and not before it. *Isthmian Steamship Co. v. The United States*, 130 F. Supp. 336 (1955).

Nor do the allegations and proofs respecting the respondent's fraudulent machinations, alter the nature of the actions. Those allegations and proofs are ancillary to the nature of the actions and were necessary to support the prayer for coercive relief as well as the issuance of the writ of foreign attachment, which are simply equitable powers with which admiralty is clothed once acquiring jurisdiction. *Swift & Company Packers, et al. v. Compania Colombiana del Caribe, S. A.*, 339 U. S. 684; 1950 A. M. C. 1089. Such allegations are required under Admiralty Rules 2 and 3, together with Sec. 826 of the New York Civil Practice

Act whose provisions, respecting execution and remedies therefor, are made available in the admiralty Courts by Admiralty Rule 20. And, such allegations should be set forth in the libel as a matter of proper procedure. *U. S.* v. *Walsh*, Fed. Cas. No. 16,635.

In reversing the District Court, the Court of Appeals cited as authority its *Silva* v. *Bankers Comm'l Corp.*, 163 F. 2d 602 and *United Transportation & L. Co.* v. *N. Y. & Balt. T. Lines*, 185 F. 2d 386, cases. Commentators have thought, however, that if any doubts existed as to admiralty's jurisdiction over such actions, they were dispelled by *Krauss Bros. Lumber Co.* v. *Dimon S.S. Co.*, 290 U. S. 117. 47 Harv. L. Rev. 519, 520; 34 Col. L. Rev. 358, 359. Neither of the cited cases are apposite to the case at Bar and, in fact, appear to have been repudiated as authority, during the pendency of this cause before this Court, by the same Court of Appeals with a different bench (Clark, Hand and Waterman, C.JJ., opinion by Hand, C.J.) in *Sword Line, Inc.* v. *United States*, Docket No. 23723, decided December 14, 1955 and not yet reported. The action there concerned an overpayment of charter hire and, upon its own initiative (p. 3), the Court of Appeals entered upon a consideration of whether or not admiralty had jurisdiction of the subject matter, though the question had not been raised by either party. Speaking of the nature of the action with respect to that question, Judge Hand stated (p. 4):

> "The suit is therefore in quasi contract for money had and received. In *United Transportation & Lighterage Co.* v. *New York & Baltimore Transportation Line*, 185 Fed. Rep. 386, this Court in 1911 after a full examination held that such claims were not so far maritime as to be justiciable in the admiralty; the Ninth Circuit held the same thing in 1926 (*Home Ins. Co.* v. *Merchants Transp. Co.*, 16 F. 2d 372); and in a dictum we repeated the doctrine in 1947 (*Silva* v. *Bankers Comm'l Corp.*, 163 F. 2d 603). Even though I were better convinced than I am that our original decision was wrong, I should feel it my duty to follow it and to leave the question to the Supreme Court, were it not for *Krauss*

Bros. Lumber Co. v. *Dimon S.S. Co.*, 290 U. S. 117 (1933), of which we were apparently not aware when we decided *Silva v. Bankers Commercial Corporation*, supra (163 F. 2d 603).

* * * * * * *

For my own interpretation of the decision I rely upon what Stone, J., said on page 124 which is all there is on the point:

'Even under the common law form of action for money had and received there could be no recovery without breach of the contract involved in demanding the payment, and the basis of recovery there, as in admiralty, is the violation of some term in the contract of affreightment, whether by failure to carry or by exaction of freight which the contract did not authorize.'

My brothers do not agree with such a limited understanding of the decision; they think that it should be read so as to cover claims in quasi-contract; but under either understanding it is clear that the district court had jurisdiction over the suit at bar."

Immediately preceding the quotation by Judge Hand from the *Krauss* case, this Court stated therein:

"It has been argued to us, as it has been in other cases, that, as the payment for excess freight was made under mistake, the demand is upon a cause of action for money had and received, which lies only at common law and not in admiralty. The objection applies with equal force to the liens allowed for excess freight, payment of which was procured by fraud and duress, or for freight paid in advance where the voyage was abandoned after the ship was loaded. Admiralty is not concerned with the form of the action, but with its substance." *Krauss v. Dimon S.S. Co.*, 290 U. S. 117, 124.

The foundation for petitioners' action necessarily was the breach—the failure to carry—and the relief sought, and allowed to them by the District Court, was simply damages for the breach—such damages being measured by the respective amounts each had paid pursuant to the contracts as-

consideration for the promised transportation whether such relief be artificially labeled as "money had and received", under common law nomenclature, or as "damages", as set forth in the libel (T. 17).

Since the jurisdiction depends upon the nature of the contract, *The Eclipse*, 135 U. S. 599, 608, upon all claims arising therefrom such jurisdiction cannot be confined to only one of the remedies on the contract when the contract is within admiralty's cognizance, *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 391, and the Court of Appeals erred in reversing the District Court and causing it to dismiss the action, thereby vacating the final decree.

QUESTION NO. 2

After the proofs are in jurisdiction of the subject matter, in admiralty, is determined by the proofs as reconciled to the libel.

Assuming, arguendo, that the libel sets forth claims limited to the nature of indebitatus assumpsit, for money had and received, based upon the wrongful withholding of moneys by the respondent as construed by the Court of Appeals (T. 3) and over which admiralty would not have jurisdiction, the Court failed to give regard to 28 U. S. C. 2111, which required it to allow amendment of any technically defective allegations. There is no doctrine of mere technical variance in admiralty, and an omission to state facts which prove to be material but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libelant, if the Court can see there was no design on his part in omitting to state them. It is the duty of the Court to extract the *real case from the whole record*, and decide accordingly. *The Syracuse*, 79 U. S. 382. Nor is the Court precluded from granting the relief appropriate to the case appearing on the

record, and prayed for by the libel; because that entire case is not distinctly stated in the libel. The Court decrees upon the whole matter before it. *DuPont* v. *Vance*, 60 U. S. 584, 587. See also, *Dampskibs Aktiesselkabet Thor* v. *Tropical Fruit Co.*, 281 Fed. 740, 742 (C. C. A. 2nd). Nor does some inaccuracy in the statement of subordinate facts, or of the legal effect of the facts propounded, preclude the Court from awarding any relief, which the law applicable to the whole case warrants. *The Gazelle*, 128 U. S. 496. Admiralty is not concerned with the form of the action, but only with its substance. *Krauss*, supra.

The strained, prejudicial construction placed upon the libel by the Court of Appeals could only arise by virtue of its application of principles of construction of pleadings akin to the narrow and inconsistent New York Civil Practice Act and Rules, and its neglect to reconcile the proofs to the libel or heed the mandate of 28 U. S. C. 2111.

About two decades ago, the law side of the Federal courts abandoned such archaic practices and adopted the long standing admiralty rule to the effect that: if upon the facts established libelants can recover upon any proposition of law within the scope of admiralty's jurisdiction, the libel must be sustained.

Upon the whole record therefor, reconciling the proofs to the libel as the District Court did (T. 10), the petitioner's action was upon the contract and within the admiralty jurisdiction and the yardstick of review by the Court of Appeals was erroneous.

QUESTION NO. 3

The Court of Appeals lacked jurisdiction to review.

The Final Decree (T. 12-13) of the District Court was entered on December 6, 1954 from which an appeal was not taken by the respondent until March 24, 1955 (T. 4)—108 days after its entry.

Though respondent made various motions in the District Court to vacate the final decree, all of his motions were seasonably denied by February 9, 1955 (T. 11) long before the expiration of the statutory period of ninety days (28 U. S. C. 2107)—March 6, 1955—within which an appeal from the final decree could be taken. Though respondent endeavored to appeal from the orders denying his motions to vacate the final decree, etc., such orders are unappealable as final orders unless the motions are grounded upon fraud, mistake, inadvertence, etc. *Taylor v. U. S.*, 145 F. 2d 641, 643 and cases therein cited. No such grounds were advocated below, as the District Court's opinion clearly shows (T. 5), nor was there any such contention in his two motions in the Court of Appeals (R. I, XVII) for a stay of execution which were likewise denied (R. XV, LII), on February 18, 1955 and March 2, 1955, respectively.

It is well settled that an order denying a judgment-debtor's motion for recall of a writ of capias and, in the alternate, a stay of execution, is not appealable as a final order. *Sabadash v. Schavo*, 128 F. 2d 923, and the authorities therein cited.

No application below for an order extending his time within which to appeal from the final decree was ever made by the respondent.

Though petitioners seasonably moved the Court of Appeals for an order dismissing the respondent's attempted appeals (R. LXV), the Court deferred consideration of the motion until consideration by it of the attempted appeals upon the merits, whereupon it, apparently, ignored the motion and rendered its decision upon the merits (T. 1).

Cited to the Court of Appeals on the motion to dismiss (R. LXVIII, LXIX, LXXI) were the above authorities, as well as this Court's *National Union of Marine Cooks v. Arnold*, 99 L. Ed. Adv. 70 case, and its citations, respecting the right of an appeal, if otherwise timely, of a judgment debtor who deliberately absents himself from the jurisdic-

tion for the purpose of frustrating the process of the Court and jeopardizing the effectiveness of a money judgment.

The attempted appeals were untimely and not within the jurisdiction of the Court of Appeals and, assuming that there existed some corrective, technical, defect, of which there is none upon this record, the action of the Court of Appeals, in reviewing the District Court's determination upon the merits, constituted a prejudicial abuse of such discretionary powers, which it may have possessed, and has opened wide the door of escape for judgment debtors, such as the respondent, and reduced the value of a money judgment of a district court and the powers of execution thereunder, to a mere scrap of paper. Upon this record, judgment debtors may remove themselves and their assets from the jurisdiction to avoid execution and, at the same time, prosecute an appeal without even so much as posting security for costs, let alone supersedeas, to the prejudice of the judgment-creditor and with impunity should the review, by the Court of Appeals, be construed as having been within its jurisdiction, or proper under the circumstances.

CONCLUSION

For all of the foregoing reasons the judgment of the Court of Appeals for the Second Circuit should be reversed and the case remanded to the United States District Court for the Southern District of New York with directions to reinstate its final decree.

Dated, New York, N. Y., December 31, 1955.

Respectfully submitted,

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District Judge Learned Hand, in sustaining the exceptions to the jurisdiction of admiralty over the libel, stated, at page 920, as follows:

> "I do not see any just distinction between paying for maritime services actually rendered more than one need, and paying for such services when not rendered at all. If any distinction is to be drawn, I should suppose that the first payment was closer to maritime matters than the second. The Oceana (D. C.) 148 Fed. 131, stands upon a genuine distinction, pointed out by Judge Hough, who also tried Union Transp., etc. Co. v. N. Y., etc., Trans, Co., supra. The ship had agreed to deduct from the freight all disbursements paid by the charterer who mistakenly overpaid her. The right of recovery rested upon the ship's unfulfilled promise and could indeed have been so pleaded at law, the payment and mistake in payment being successively pleaded in a voidance as plea and replication. The right to sue in *indebitatus assumpsit* should not obscure that very obvious difference."

Another leading case supporting the respondent's contention is *United Transportation & Lighterage Co.* v. *New York & Baltimore Transp. Line*, 185 Fed. 386, wherein the Court, at page 389, stated as follows:

> "Of course the action of assumpsit for money had and received, while in form an action of law, is based upon equitable principles, and it is by no means obvious that it would be broad enough to afford relief in the case of such a transaction as is stated in the cross-libel. Still, for the purposes of this case, we will assume that the contention of the respondent is well founded, and that an action at law would lie against the libellant corporation upon

its implied promise to repay moneys received by it which in justice and good conscience it ought not to retain."

and at pages 390, 391, further stated as follows:

"The maritime contract was the one which the respondent says was fraudulent. It does not seek to enforce but to avoid that. It cannot, however, have such contract set aside without invoking the equitable relief which a court of admiralty cannot grant. Moreover, even from this point of view, the matter is not maritime. * * *

As we have already stated, the remedy of the respondent, if its charges be well founded, would seem to be in equity to set aside the alleged wrongful agreement and to compel an accounting. Perhaps, as we have also seen, an action in assumpsit for money had and received would lie. But a court of admiralty cannot afford the necessary equitable relief; nor can it grant the legal relief, because the implied promise to repay the moneys which cannot in good conscience be retained—necessary to support the action for money had and received—is not a maritime contract."

(2)

The petitioner studiously avoids mentioning the fact that the respondent filed three separate notices of appeal, each of which was timely. The respondent appealed from the decision and order of January 11, 1955, by notice of appeal dated and filed February 9, 1955—within a period of less than thirty days. The respondent appealed from the opinion, decision and order of February 9, 1955, by notice dated and filed February 17, 1955—within a period of less than thirty days. The respondent also appealed from the decree docketed as a judgment on January 11,

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IN THE

Supreme Court of the United States

October Term, 1955

No. 351

R. V. ARCHAWSKI, *et al.*,

Petitioners,

v.

BASIL HANIOTI, *etc.*,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported in 123 Fed. Supp. 410. The opinion of the Court of Appeals for the Second Circuit is reported in 223 Fed. (2d) 406.

Questions Presented

The questions presented by the petitioner are non-existent:

1. There is no question presented for review concerning the admiralty jurisdiction of the District Court over maritime contracts since his action was not an action based upon contract seeking the recovery of passage moneys but was a claim against a third party, the respondent herein, who was not the owner of the vessel and had no contractual

relation with the claimants, which claim was based upon alleged tortious conduct in the nature of fraud.

2. As will hereafter be demonstrated the "question" raised by petitioner of the jurisdiction of the Court of Appeals to entertain the appeal is frivolous.

Statement of Case

On the 16th day of September, 1952, an in personam suit in admiralty was commenced by the filing of a libel and a writ of foreign attachment against the SS Carmen, which was owned by the Basile Shipping Company, Inc. (R. 245-258). After the said writ had been executed by the United States Marshal a third party claim was filed on behalf of said Basile Shipping Company, Inc., a New York corporation which had its principal place of business in the Southern District of New York, claiming that it was the lawful owner of the SS Carmen and that said vessel had been wrongfully attached and that Basil Hanioti, the respondent herein, had no interest whatsoever in said vessel. Hearings were held before the Honorable Sylvester J. Ryan, United States District Judge (R. 1-187a), and as a result thereof a decision was rendered on the 24th day of September, 1952, in which the Court held that it was without jurisdiction in said suit to issue a writ of foreign attachment and therefore dismissed the same (R. 264-269).

During the course of the hearings the respondent herein, who had not been previously served with the libel, appeared voluntarily by Frank H. Cooper and Frank Delaney, his attorneys, and filed an appearance in the suit (R. 270). Subsequently said respondent interposed an answer denying all of the material allegations of the libel (R. 285-288).

The libel, in effect, charges that the respondent obtained moneys through various acts of fraud and fraudulent

representations and used various corporations to accomplish the fraud and converted moneys so fraudulently obtained to his own use. The charges of obtaining moneys through fraud, conversion and misapplication of funds are all interwoven in one cause of action. There is no allegation in the libel that the respondent entered into any contract with any of the libellants.

The libel is one for damages by reason of fraud, conversion and misappropriation of funds. The suit, although labelled as an admiralty action (apparently in order to give the Federal Court jurisdiction) is not a suit in admiralty and was subject to dismissal for that reason alone since there were no allegations in the libel showing diversity of citizenship between the libellants and the respondent, or showing that each libellant had a claim for $3,000 or over.

The Court of Appeals in its opinion, after analyzing the complaint, stated that while a contract for the transportation of passengers by sea is a maritime contract, and a suit for its enforcement would plainly be within the admiralty jurisdiction of the District Court, this libel sets forth no such claim and, further, that if the libel is viewed as stating some sort of a claim based upon tortious conduct in the nature of fraud, as seems to have been the intent of the pleader, the case against admiralty jurisdiction is even clearer.

The trial of the suit was scheduled for November 24, 1954. The respondent herein did not appear but Frank H. Cooper, one of the attorneys of record for said respondent, did appear and permitted an inquest to be taken without making any effort on behalf of the respondent to defend the suit (R. 188-197), and on the 6th day of December, 1954, a default decree was entered and signed by the Honorable Lawrence E. Walsh, United States District Judge, under the terms of which the respondent herein was required to pay to the libellants the sum of $130,383.69 (R. 293, 294).

The decree also contained a provision that unless it was satisfied within ten days from the date of service upon the said respondent's attorneys, with notice of entry thereof, and unless execution thereunder was stayed by an appeal with proper and approved security thereon within the ten day period, the Clerk of the District Court was directed to issue to the United States Marshal a writ of attachment against the person of said respondent.

On the 7th day of December, 1954, the respondent, acting through a new attorney, obtained an order to show cause to vacate the default decree and to enjoin the enforcement of the body execution (R. 299-315a). In support of said motion the respondent urged (a) that the default was not wilful or deliberate and the libellants were not entitled to enter a default judgment; (b) that the libellants failed to offer evidence at the inquest before the District Court sufficient to make out a *prima facie* case and that, on the contrary, the libellants failed to offer any admissible evidence in support of the libel; (c) that the respondent had a good and meritorious defense to the alleged cause of action; (d) that although the suit was brought in admiralty it was in fact a civil suit over which the Federal Court did not have jurisdiction since it failed to allege diversity of citizenship and the jurisdictional amount in connection with each claim; (e) that under no circumstances should the decree have carried with it a writ of execution against the person of the respondent.

The said motion was denied on the 11th day of January, 1955, by a written memorandum endorsed upon the moving papers (R. 299-315a). On the same day, to wit, the 11th day of January, 1955, the final decree was docketed as judgment #59,801 (R.B.). This apparently was necessary in order to issue execution to the Marshal. A proposed order with notice of settlement was thereupon submitted, based upon the foregoing decision, and thereafter District Judge Walsh refused to sign said order and handed down an opinion and order, on the 9th day of February, 1955, again denying

the motion of the respondent herein to vacate the decree of the 6th day of December, 1954 (R. 317-324).

The respondent herein appealed from the decision of January 11, 1955, by notice of appeal dated and filed the 9th day of February, 1955, within the thirty day period (R. 325). Said respondent appealed from the opinion decision and order of February 9, 1955, by notice of appeal dated and filed the 17th day of February, 1955, within the thirty day period from said order (R. 326). Said respondent also appealed from the decree docketed as a judgment on the 11th day of January, 1955, by notice of appeal dated and filed the 24th day of March, 1955, within ninety days from the date of the docketing of the decree as a judgment (R. 391).

ARGUMENT

There is no basis for the allowance of the writ.

(1)

The decision of the Court of Appeals is not in conflict with any decision of another Court of Appeals on the same matter and is not in conflict with any applicable decision of this Court.

The cases cited by the petitioner herein are either proceedings *in rem* or are actions based upon an express contract.

The decisions cited by the petitioner are not in conflict with the decisions of the Court of Appeals in the case at bar and, as a matter of fact, the cases cited support the decision of the Court of Appeals. The Court of Appeals, at pages 407 and 408, stated as follows:

> "While a contract for the transportation of passengers by sea is a maritime contract, and a

suit for its enforcement would plainly be within the admiralty jurisdiction of the District Court, this libel sets forth no such claim, but rather is in the nature of the old common law *indebitatus assumpsit*, for money had and received, based upon the wrongful withholding of moneys by respondent, on the theory that in equity and good conscience he is under a duty to pay them over to libellants. *Silva v. Bankers Commercial Corporation*, 163 F. 2d 602 (C. C. A. 2, 1947); *United Transp. & L. Co. v. New York & Baltimore T. Line*, 185 Fed. 386 (C. C. A. 2, 1911). If the libel is viewed as stating some sort of a claim based upon tortious conduct in the nature of fraud, as seems to have been the intent of the pleader, the case against admiralty jurisdiction is even clearer."

It is clear from the foregoing that Circuit Judge Medina recognized the principle of law that a contract for transportation of passengers is a maritime contract and that a suit for its enforcement would be within the admiralty jurisdiction of the District Court but Circuit Judge Medina stated that the libel in the case at bar sets forth no such claim.

The petitioner cites no case that a claim which is in the nature of the old common law *indebitatus assumpsit*, for money had and received, based upon the wrongful withholding of moneys, may be maintained in admiralty. Nor does petitioner cite any case that a libel alleging a claim based upon tortious conduct in the nature of fraud is within the admiralty jurisdiction.

Circuit Judge Medina, in analyzing the libel, came to the inescapable conclusion that the cause of action was not based upon a contract. An analysis of the libel conclusively supports the finding that it was not based upon a contract and could not have been based upon a contract. Respondent

Hanioti was not a party to any contract. Under the most liberal interpretation of the libel, he is being sought to be held liable as a *trustee ex maleficio.*

A case directly supporting the decision of the Court of Appeals is *Silva et al. v. Bankers Commercial Corporation* (C. C. A. 2) 163 Fed. (2d) 602. That was a civil suit in which federal jurisdiction was based upon a diversity of citizenship of the parties and the required amount involved. In that case the plaintiffs recovered judgment against the defendant in an action brought to recover freight money which had been paid to the defendant's assignor in connection with a voyage which was abandoned by the carrier, with the consent and assistance of the defendant. The defendant argued that the issues involved in the suit were maritime and were governed by the rules of admiralty. The Court of Appeals did not agree with this contention and, at pages 604 and 605, stated as follows:

> "* * * *The claim asserted is in the old common law action of indebtiatus assumpsit, over which a court of admiralty has no jurisdiction. It would make no difference whether the claim was based upon unjust enrichment or fraudulent representations—of which there were none in this case; in neither event would recovery lie in admiralty.* United Transp. & L. Co. v. New York & Baltimore T. Line, 2 Cir., 185 F. 386, 389; Minturn v. Maynard, 17 How. 477, 15 L. Ed. 235; Israel v. Moore & McCormack Co., D. C., 295 F. 919. The jurisdiction of the District Court was based on diverse citizenship of the parties. The action is for recovery at common law and under the rule of Erie R. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, is governed by the law of the State of New York" (italics ours).

Kaufman et al. v. John Block & Co. Inc. et al., 60 Fed. Supp. 992 (D. C. S. D. N. Y.) is another case in point.

There the libel contained two causes of action. The first cause of action alleged a breach of contract to carry goods by sea and was within the admiralty jurisdiction of the Court. The second cause of action alleged that the principal was a wholly fictitious corporation and that the respondents knew it was a wholly fictitious corporation which was not the charterer or operator of the "Marie Anna" of any other vessel and that the respondents represented themselves as officers, directors and agents for the "Marie Anna" and used fictitious names in so holding themselves. The District Court, with respect to the second cause of action, stated, at page 993, as follows:

> "*This cause of action is either for moneys had and received or for fraud. In either event, it is not maritime but a pure common law action. This Court's admiralty jurisdiction does not extend to any suit not maritime.* Rea v. The 'Eclipse', 135 U. S. 599, 10 S. Ct. 873, 34 L. Ed. 269, nor can non-admiralty causes of action be joined to admiralty ones. Westfall Larson & Co. v. Allman-Hubble Tug Boat Co., 9 Cir., 73 F. 2nd 200; The Yankee, D. C., 37 F. Supp. 512, 513.
>
> Giving full faith and credit to the allegations of the second cause of action in the libel, it seems to me *that the charge set forth is one of obtaining money under false and fraudulent representations; a common law action.* True, the artifice used is a bill of lading but this cause of action has not to do with the bill of lading but with the obtaining of money by fraud" (italics ours).

A cause of action charging fraud and deceit in falsely representing corporate power in a corporation to make an alleged guarantee of demurrage in the event a certain vessel fails to clear the port of loading within the free time allotted to the shipper is not within admiralty jurisdiction

and another cause of action for breach of an individual representation and warranty that the said guarantee was the full act and deed of the corporation would not bring it within the jurisdiction of the Court. *Black Sea States SS Line v. Association of International Trade Dist. 1, Inc., et al.*, 95 Fed. Supp. 180.

In *Williams v. Providence Washington Insurance Co.* 56 Fed. 159 (D. C. S. D. N. Y.) a libel was filed to recover under a policy of insurance issued by the respondent against perils of the sea. The boat was damaged by sea perils in Long Island Sound, at a dock at Stamford, Conn. The policy was accepted and a premium paid in reliance upon certain representations which were false and fraudulent when made. The libellant claimed that since it complied with the conditions of the policy it was entitled to recover damages in the amount of the loss. Exceptions were filed to the libel for lack of jurisdiction of the cause of action stated in the libel. The Court, in sustaining the exceptions to the jurisdiction stated, at page 160, as follows:

> "* * * *The complaint is, in fact, an action for false and fraudulent representations, by which the libellant was inducted to accept the policy, supposing that he was insured for the Sound, when he was not. Such an action is not upon the policy itself, but upon the negotiations leading to it. It is not brought like The Electron, 48 Fed. Rep. 689, for any misrepresentations in the policy or for damages in the execution of the policy. The representations here are no part of the contract, but outside of it, and anterior, or preliminary to the contract, and as such not properly maritime*" (italics ours).

Even if the libel be interpreted as pleading a cause of action for moneys had and received or in *indebitatus assumpsit*, there would be no admiralty jurisdiction. In *Israel et al. Moore & McCormack Co. Inc.*, 295 Fed. 919,

1955, by notice of appeal dated March 24, 1955—within a period of ninety days from the docketing of the decree as a judgment.

All of the appeals were timely and properly taken. The orders from which the appeals were taken were based upon a motion to set aside a default decree entered after inquest. Such orders are final because they affect the ultimate outcome of the controversy.

A case in point is *Weilbacher* v. *J. H. Winchester & Co.*, 197 Fed. (2d) 303 (U. S. C. A. 2 Cir.) wherein the Court, in discussing the question of the finality and appealability of orders based upon motions to set aside judgments, stated, at page 305, as follows:

> "At the outset we must determine whether the order appealed from is a final order within the purview of Section 1291 of the Judicial Code. 28 U. S. C. A. § 1291. Obviously, the objective of that section is to forestall appellate review when the decision below has but an inconclusive effect on the final outcome of the litigation. *This is best illustrated in the example of a motion, also under Rule 60 (b), to reopen a default judgment. Thus, the denial of such a motion is a final order, Tozer v. Charles A. Krause Milling Co., 3 Cir., 189 F. 2d 242, for by its decision the district court has indicated that no further action will be taken at that level which will change the outcome and unless the order is appealable the controversy is at an end. On the other hand, the granting of the motion is not reviewable, United States v. Agne, 3 Cir., 161 F. 2d 331; since the ultimate disposition of the case may not be affected thereby*" (italics ours).

Another case in point discussing the finality and appealability of an order such as in the instant action is *Greenspahn* v. *Joseph E. Seagram & Sons*, 186 Fed. (2d) 616,

(U. S. C. A. 2 Cir.) where the Court, at page 619, stated as follows:

> "* * * But we are willing to go further and state our belief that the order is appealable as fully as any other final order. Rule 60 (b) expressly provides that a motion made thereunder 'does not affect the finality of a judgment or suspend its operation'. An order denying such a motion puts an end to any further action by the district court and leaves the judgment in full force and effect. We think it is a final order and therefore appealable."

In *Sterirmac Oil & Gas Co. v. Dittman*, 245 U. S. 210, 38 Sup. Ct. 116, the Court, at page 118, stated as follows:

> "The plaintiff in error correctly contends that the proceeding to set aside the original judgment is in effect an independent action, and the judgment therein final and reviewable. The proceeding to set aside the original judgment is based upon the theory that *no jurisdiction was acquired over the Sterirmac Oil & Gas Company* by the service of the process as amended by the court's order, and hence the company was never properly subject to the jurisdiction of the court in the original suit. No contention is made that the court could not entertain the proceeding to set aside the judgment, indeed it did entertain jurisdiction and decided against the contention of the plaintiff in error. In such case we have no doubt that in view of the nature of the attack made upon the original judgment, the judgment in the present proceeding was final, and reviewable in the Court of Appeals" (italics ours).

Assuming, without conceding, that the docketing of the decree as a judgment on January 11, 1955, did not fix the time for the commencement of the ninety day period,

as contended by the libellants, the appeal taken on March 24, 1955, was still timely since under Rule 73 (a) of the Federal Rules of Civil Procedure the running of the time of appeal was terminated by the motion made to set aside the judgment and therefore the time to appeal must be computed from the entry of the order denying the motion to vacate the judgment, to wit, January 14, 1955, the date of the first decision, or February 9, 1955, the date of the filing of the opinion and order. Cases supporting this rule are:

> *Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S. 203, 63 Sup. Ct. 543, 544;
>
> *Salmon et al.* v. *City of Stuart, Fla.*, 194 Fed. (2d) 1004 (U. S. C. A. 5 Cir.).

In *United States ex rel. Harrington* v. *Schlotfeldt*, 136 Fed. (2d) 935, the Court, at page 937, stated as follows:

> "Appellee urges that the appeal is improperly before us in view of the fact that notice of it was filed on December 28, from a decree entered September 22. The court permitted the filing of a motion to vacate the decree on December 19, ordered the Government to answer, and set the matter for hearing. Where such motion to vacate is permitted to be filed and taken under consideration prior to the expiration of the period allowed for taking an appeal, we are of the opinion that it suspends such period, and that notice of appeal duly filed after disposition of the motion is filed and timely. Cf. Zimmern v. United States, 298 U. S. 167, 56 S. Ct. 706, 80 L. Ed. 1118; Wayne Gas Co. v. Owens Illinois Glass Co., 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed. 557. We think the Federal Rules of Civil Procedure, Nos 6, 59 and 60, 28 U. S. C. A. following section 723c do not require a contrary ruling."

To the same effect see:

Reliance Life Insurance Co. v. Burgess, 112 Fed. (2d) 234;

Neely v. Merchants Trust Co. of Red Bank, New Jersey, 110 Fed. (2d) 525.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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